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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-760

HENRY L. TOMOW, SR., ET AL., *Petitioners,*

v.

MENOMINEE ENTERPRISES, INC., ET AL., *Respondents,*

and

N. E. ISAACSON & ASSOCIATES, INC., *Respondent.*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE, ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, by and through its undersigned attorneys, moves the Court for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in the above-captioned case. The petitioners Henry L. Tomow, Sr., et al., and re-

spondents, Menominee Enterprises, Inc., et al., have consented to the filing of this brief; respondent, N. E. Isaacson & Associates, Inc., has refused to consent.

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of *amicus curiae* briefs with this Court in *Mescalero Apache Tribe* v. *Jones*, — U.S. —, 36 L.Ed. 2d 114 (1973), *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 405 U.S. 933, 30 L.Ed. 2d 809 (1972), *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L.Ed. 2d 741 (1972), *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392, 20 L.Ed. 2d 689 (1968), and *Warren Trading Post Co.* v. *Arizona State Tax Comm'n.*, 380 U.S. 685, 14 L.Ed. 2d 165 (1965).

This case presents a question of great and continuing concern to the Association and to all American Indians—whether the general rule that federal statutes affecting the rights of Indian tribes must be liberally construed for their benefit and protection is applicable to legislation which, when finally implemented, provides for termination of the special relationship of a tribe to the United States. In the present case, the Association is concerned with this broad and novel issue in a specific context—namely, whether the rule of liberal construction should have been applied to the

Menominee Termination Plan, which was promulgated pursuant to the requirements of the federal act terminating the government's special relationship to the Menominee Tribe of Indians.

The Association submits the attached brief in order to assist the Court in recognizing that the decision of the Supreme Court of the State of Wisconsin contravenes the long line of precedents established by this Court which hold explicitly that a liberal rule of construction must be applied to federal statutes affecting the rights of Indian tribes. Since the foregoing point covers an important facet of the decision below which the immediate parties are not likely to emphasize, and since such discussion thus may be helpful to the Court, the Association requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

INTEREST OF AMICUS CURIAE

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

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The Association submits the following brief in order to assist the Court in recognizing that the decision of the Supreme Court of the State of Wisconsin contravenes the long line of precedents established by this Court which hold explicitly that a liberal rule of construction must be applied to federal statutes affecting the rights of Indian tribes.

STATEMENT OF THE CASE

On June 17, 1954 Congress enacted the Menominee Termination Act to " . . . provide for the orderly ter-

[1] Although this case involves only the Menominee Termination Act, comparable termination statutes have been enacted for a number of Indian tribes. See, *e.g.,: Act of August* 13, 1954, 25 U.S.C. 564 *et seq.* (Klamath); Act of August 23, 1954, 25 U.S.C. 721 *et seq.* (Alabama and Coushatta Indians of Texas); Act of August 27, 1954, 25 U.S.C. 677 *et seq.* (Ute); Act of August 2, 1956, 25 U.S.C. 821 *et seq.* (Peoria Tribe of Oklahoma); Act of September 21, 1959, 25 U.S.C. 931 *et seq.* (Catawba Tribe of South Carolina).

mination of Federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." 25 U.S.C.A. § 891 (1963). Termination became final and complete when the Secretary of the Interior promulgated a Proclamation of Termination on April 29, 1961.

Pursuant to requirements in the Menominee Termination Act, the members of the Menominee Tribe approved, in January, 1959, a Termination Plan which provided for the establishment of a tribal corporation, Menominee Enterprises, Inc. (MEI), to hold legal title to and manage the tribal assets, which consisted primarily of land originally held by the United States as trustee for the Menominee Tribe. See *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404, 20 L. Ed. 2d 697 (1968). Article XII of MEI's Articles of Incorporation, which were also a part of the Termination Plan, contained the following provisions: "Unless otherwise authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock entitled to vote thereon, the corporation shall have no authority to sell, exchange, assign, convey or otherwise transfer all or any portion of the real property owned by the corporation . . ."

The Termination Plan also provided for the establishment of a Voting Trust which would hold and vote the shares of stock issued by MEI, and which would be administered by seven trustees. The Board of Directors of MEI and the trustees of the Voting Trust passed a joint resolution approving a development plan which necessarily would result in the alienation to non-Menominees of land held by MEI. In

July, 1968, MEI and N. E. Isaacson, a land developer, entered into a joint venture agreement, the purpose of which was to implement the joint resolution of August, 1967. The trustees of the Voting Trust unanimously approved the joint venture agreement.

On October 25, 1971, petitioners, all of whom are members of the Menominee Tribe, filed the present action in the Circuit Court for Menominee County, Wisconsin, in an attempt to halt further sales of tribal land under the joint venture agreement to non-Menominees. Petitioners alleged, *inter alia,* that with the exception of certain sales to enrolled members of the Menominee Tribe, Article XII prohibited the sale of any land held by MEI unless such sales were authorized by an affirmative vote of two-thirds of the enrolled members of the Menominee Tribe.

The Circuit Court for Menominee County adopted petitioners' contention. As the basis for reaching its conclusion, the Circuit Court considered not only the language in the Voting Trust Agreement and the Articles of Incorporation of MEI, but also extrinsic evidence bearing on the intent of Article XII and the circumstances surrounding the consideration and approval of the Termination Plan by the Menominee Tribe.

On appeal the Supreme Court of Wisconsin rejected both the method of decision and the holding of the Circuit Court. The Supreme Court held that the trustees of the Voting Trust had the power to alienate land held by MEI, and that the provisions of Article XII were inoperative during the life of the Voting Trust. Furthermore, relying on what it considered to be an established rule of state law, the

Supreme Court reached its conclusion by considering only provisions in the Voting Trust Agreement, and made no attempt to determine the meaning attributed to Article XII by members of the Menominee Tribe at the time they approved the Termination Plan in January, 1959.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Wisconsin represents an abrupt departure from the long-established legal principle that federal statutes affecting the rights of Indian tribes must be liberally construed in their favor.[2] See *Squire* v. *Capoeman*, 351 U.S. 1, 100 L. Ed. 883 (1956); *Carpenter* v. *Shaw*, 280 U.S. 363, 74 L. Ed. 478 (1930); *Choate* v. *Trapp*, 224 U.S. 665, 56 L. Ed. 941 (1912).

In *Choate* this Court considered the question whether a tax exemption created by federal statute immunized certain lands held by members of the Choctaw and Chickasaw Tribes from taxation by the State of Oklahoma. The State urged that, pursuant to the general rule, the tax exemption should be strictly construed. This Court explicitly rejected the State's contention:

> [I]n the government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful

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[2] This rule derives directly from a long line of cases in which a rule of identical substance has been used by this Court to interpret provisions in treaties between the United States and Indian tribes. See *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115 (1942); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 82 L. Ed. 1213 (1938); *Worcester* v. *Georgia*, 5 Pet. 515, 8 L. Ed. 492 (1832).

> expressions . . . are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years . . .

Id. at 675, 56 L. Ed. at 956.

The rule of liberal construction was emphatically affirmed in the *Carpenter* case. There the question was whether a tax exemption created by federal statute immunized from state taxation certain royalty interests in petroleum owned by members of the Choctaw Tribe. This Court held that "[w]hile, in general, tax exemptions are not to be presumed and statutes conferring them are to be strictly construed . . . the contrary is the rule to be applied to tax exemptions secured to the Indians by agreement between them and the national government . . . . Such provisions are to be liberally construed." *Carpenter* v. *Shaw,* 280 U.S. at 366-67, 74 L. Ed. at 481.

This Court again emphasized the continuing validity of the rule of liberal construction for statutes affecting Indian rights in the *Squire* case. There the question was whether proceeds from the sale by the United States of standing timber on allotted land on an Indian reservation could be made subject to the capital gains tax consistent with ". . . applicable treaty and statutory provisions and the Government's role as [a] trustee and guardian [of Indian tribes]." *Squire* v. *Capoeman,* 351 U.S. at 2, 100 L. Ed. at 887. Interpreting the relevant federal statute in light of the rule of liberal construction, this Court held that such proceeds were exempt from federal capital gains taxes.

The Wisconsin Supreme Court should have applied the same rule to Article XII.[3] Although the Articles of Incorporation of MEI are not themselves a federal law, they were formulated and approved as part of the Termination Plan which was required explicitly by Section 896, 25 U.S.C.:

> The Tribe shall as soon as possible and in no event later than February 1, 1959, *formulate and submit to the Secretary a plan for the future control of the tribal property* and service functions now conducted by or under the supervision of the United States, including but not limited to services in the fields of health, education, welfare, credit, roads, and law and order, and for all other matters involved in the withdrawal of Federal supervision. [Emphasis added.]

25 U.S.C.A. § 896 (1963). Furthermore, the Termination Plan, of which the Articles of Incorporation of MEI were such an intergral part, could not be implemented until the Secretary of the Interior approved it. Thus, the nexus between the Menominee Tribe on one hand and a federal statute and federal officials on the other is clearly a strong one.

At the time the members of the Menominee Tribe approved Article XII, they were still beneficiaries of trust property and otherwise under the protection of

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[3] Although several courts have considered cases involving Indian tribes whose relationship with the federal government had been terminated or was in the process of being terminated, no court has addressed directly the question whether the rule of liberal construction should be applied to federal termination statutes. *See Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L. Ed. 2d 741 (1972); *Menominee Tribe* v. *United States*, 391 U.S. 404, 20 L. Ed. 2d 697 (1968); *Reyos* v. *United States*, 431 F. 2d 1337 (10th Cir. 1970); *Crain* v. *First National Bank of Oregon*, 324 F. 2d 532 (9 Cir. 1963).

the United States. The members of the Menominee Tribe considered the Articles of Incorporation of MEI on January 9, 10, and 17, 1959, and approved them on January 17, 1959, but termination did not become effective until April 30, 1961, when the Secretary of the Interior issued the Proclamation of Termination approving the Termination Plan and transferring the assets of the Menominee Tribe to MEI. See *Crain* v. *First National Bank of Oregon,* 324 F.2d 532 (9 Cir. 1963); *see generally Affiliated Ute Citizens* v. *United States,* 406 U.S. 128, 31 L. Ed. 2d 741 (1972).

In addition to purely legal considerations, the rationale behind the rule of liberal construction applies to petitioners' situation. The record in the present case is replete with evidence which indicates that members of the Menominee Tribe had little or no understanding of the meaning and effect of various aspects of the Termination Plan. Trial Court Record at 619, 620, 621, 623, 624, 638, 639, 640, 643, 651-52, 653, 660, 663, 675. Furthermore, evidence in the record also indicates that members of the Menominee Tribe understood Section XII to require their approval by a two-thirds vote of all land sales to non-Menominees. Trial Court Record at 633, 637, 638, 645-46, 664, 676, 699, 700. Just as much as any treaty, the underlying documents in a federally-required tribal termination program should be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan,* 175 U.S. 1, 11, 44 L. Ed. 49, 54 (1899).

CONCLUSION

As entities whose relationship to the United States "resembles that of a ward to his guardian" (*Cherokee Nation* v. *Georgia,* 5 Pet. 1, 17, 8 L. Ed. 25, 31 (1831)), Indian tribes have been compelled to rely on the federal government to protect their interests. In order to insure that these interests are protected adequately, this Court has applied for over a century a rule of liberal construction to all federal statutes affecting the rights of Indian tribes. The Supreme Court of Wisconsin departed from this long line of authority by failing to apply the rule to the Menominee Termination Plan—a decision which, for the benefit and protection of all Indians similarly situate, ought to be reviewed and reversed by this Court.

Respectfully submitted,

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